Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

BRIAN E. ROUTEN,

Petitioner,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals exceeded its jurisdiction when it made a crucial interpretation of a statute not relied on by the Court of Veterans Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit, No. 97-7064 (Apr. 30, 1998), is as yet unpublished and is reprinted in the Appendix ("App.") at App. 1. The opinion of the Court of Veterans Appeals in *Routen v. Brown* is published at 10 Vet.App. 183 (1997) and reprinted at App. 23. The underlying Board of Veterans' Appeals decision in the appeal of Brian E. Routen is reprinted at App. 43.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on April 30, 1998.

PROVISIONS INVOLVED

38 U.S.C. § 1110. Basic entitlement.

> For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in the line of duty, in the

active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

38 U.S.C. § 1131. Basic entitlement.

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in the line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

38 U.S.C. § 1137. Wartime presumptions for certain veterans.

For the purposes of this subchapter and subchapter V of this chapter and notwithstanding the provisions of section 1132 and 1133 of this subchapter, the provisions of sections 1111, 1112, and 1113 of this chapter shall be applicable in the case of any veteran who served in the

active military, naval, or air service after December 31, 1946.

38 U.S.C. § 1153. Aggravation.

A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.

38 U.S.C. § 5108. Reopening disallowed claims.

If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim.

38 U.S.C. § 5109A. Revision of decisions on grounds of clear and unmistakable error.

(a) A decision by the Secretary under this chapter is subject to revision on grounds of clear and unmistakable error. If evidence establishes the error, the decision shall be reversed or revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

. . . .

(d) A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.

38 U.S.C. § 7104. Jurisdiction of the Board.

. . . .

(b) Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based on the same factual basis may not be considered.

. . . .

38 U.S.C. § 7111. Revision of decisions on grounds of clear and unmistakable error.

(a) A decision by the Board is subject to revision on grounds of clear and unmistakable error. If evidence establishes the error, the decision shall be reversed or revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision of the Board that constitutes a reversal or revision of a prior decision of the Board on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

. . . .

(d) A request for revision of a decision of the Board based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted directly to the Board and shall be decided by the Board

on the merits, without referral to any adjudicative or hearing official acting on behalf of the Secretary.

. . . .

38 U.S.C. § 7292. Review by the United States Court of Appeals for the Federal Circuit.

(a) After a decision of the United States Court of Veterans Appeals is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Veterans Appeals within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts.

. . . .

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Veterans Appeals that the Court of Appeals for the Federal Circuit finds to be –

(A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

(e)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Veterans Appeals is not in accordance with law, to modify or reverse the decision of the Court of Veterans Appeals or to remand the matter, as appropriate.

(2) Rules for review of decisions of the Court of Veterans Appeals shall be those prescribed by

the Supreme Court under section 2072 of title 28.

38 C.F.R. § 3.102. Reasonable doubt.

It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not substantially prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine of the entire, complete record otherwise warrants invoking this doctrine. . . .

38 C.F.R. § 3.156. New and material evidence.

(a) *New and material evidence* means evidence not previously submitted to agency decision-makers which bears directly and substantially upon the specific matter under consideration,

> which is neither cumulative nor redundant, and which by itself or in connection with evidence previously assembled is so significant that it must be considered in order to fairly decide the merits of the claim.
>
> . . . .

38 C.F.R. § 3.306 (1997). Aggravation of preservice disability.

> (a) *General.* A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.
>
> (b) *Wartime service; peacetime service after December 31, 1946.* Clear and unmistakable evidence (obvious or manifest) is required to rebut the presumption of aggravation where the preservice disability underwent an increase in severity during service. This includes medical facts and principles which may be considered to determine whether the increase is due to the natural progress of the condition. Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of the disability prior to, during and subsequent to service.
>
> > (1) The usual effects of medical and surgical treatment in service, having the effect of ameliorating disease or other conditions incurred before enlistment, including postoperative scars, absent or poorly functioning parts or organs, will not be considered

service connected unless the disease or injury is otherwise aggravated by service.

(2) Due regard will be given the places, types, and circumstances of service and particular consideration will be accorded combat duty and other hardships of service. The development of symptomatic manifestations of a preexisting disease or injury during or proximately following action with the enemy or following a status as a prisoner of war will establish aggravation of a disability.

(c) *Peacetime service prior to December 31, 1946.* The specific finding requirement that an increase in disability is due to the natural progress of the condition will be met when the available evidence of a nature generally acceptable as competent shows that the increase in severity of a disease or injury or acceleration in progress was that normally to be expected by the inherent character of the condition, aside from any extraneous or contributing cause or influence particular to military service. Consideration will be given to the circumstances, conditions, and hardships of service.

38 C.F.R. § 3.306 (1991). Aggravation of preservice disability.

(a) *General.* A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.

(b) *War service.* Clear and unmistakable evidence (obvious or manifest) is required to rebut the presumption of aggravation where the preservice disability underwent an increase in severity during service. This includes medical facts and principles which may be considered to determine whether the increase is due to the natural progress of the condition. Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of the disability prior to, during and subsequent to service.

(1) The usual effects of medical and surgical treatment in service, having the effect of ameliorating disease or other conditions incurred before enlistment, including postoperative scars, absent or poorly functioning parts or organs, will not be considered service connected unless the disease or injury is otherwise aggravated by service.

(2) Due regard will be given the places, types, and circumstances of service and particular consideration will be accorded combat duty and other hardships of service. The development of symptomatic manifestations of a preexisting disease or injury during or proximately following action with the enemy or following a status as a prisoner of war will establish aggravation of a disability.

(c) *Peacetime service.* The specific finding requirement that an increase in disability is due to the natural progress of the condition will be met when the available evidence of a nature generally acceptable as competent shows that

> the increase in severity of a disease or injury or acceleration in progress was that normally to be expected by the inherent character of the condition, aside from any extraneous or contributing cause or influence particular to military service. Consideration will be given to the circumstances, conditions, and hardships of service.

STATEMENT OF THE CASE

1. A veteran who suffers from a continuing disability which was incurred in or aggravated by active military duty is entitled to federal disability benefits under laws administered by the Department of Veterans Affairs ("VA"). *See* 38 U.S.C. §§ 1110 (establishing basic entitlement to benefits for wartime veterans), 1131 (establishing basic entitlement to benefits for peacetime veterans); *see generally* §§ 1101 *et seq.* If a veteran enters service with a disability, and the disability increases in severity during service, then that disability

> will be considered to have been aggravated by active . . . service . . . unless there is a specific finding that the increase in disability is due to the natural progress of the disease.

38 U.S.C. § 1153 (1998).

For wartime veterans, the presumption of aggravation may be rebutted only by a specific showing, based on "clear and unmistakable evidence (obvious or manifest)," that the increase in disability was due to the natural progress of the disease. 38 C.F.R. § 3.306(b) (1997). In contrast, for peacetime veterans, until 1992, the presumption of aggravation could be rebutted by presenting

"available evidence of a nature generally accepted as competent" showing that the increase in severity was due to the normal progression of the disease. *See* 38 C.F.R. § 3.306(b), (c) (1991).

However, the weaker standard for rebuttal of the presumption did not comport with the statutory scheme. Specifically, it failed to take into account 38 U.S.C. § 1137, which extends certain evidentiary presumptions to all veterans who served after December 31, 1946. Therefore, in 1992, the VA changed 38 C.F.R. § 3.306 so that the more stringent standard for rebuttal of the presumption applied to peacetime veterans who served after December 31, 1946, as well as to wartime veterans. *See* Aggravation of Preservice Disability, 57 Fed. Reg. 59,296 (1992). That is, since 1992, if a peacetime veteran's disability increased during service, it is presumed that service aggravated the disability, in the absence of clear and unmistakable evidence rebutting that presumption. Obviously, under the new § 3.306, some peacetime veterans who would not previously have qualified for benefits are now entitled to receive benefits.

2. A veteran seeking disability benefits from the VA must file an original claim with a VA regional office. If the regional office denies his claim, he may appeal to the Board of Veterans' Appeals ("BVA"). Like regional office proceedings, BVA proceedings are informal and ex parte in nature. In fact, until 1988, BVA decisions were not subject to judicial review. However, in 1988, Congress created the United States Court of Veterans Appeals ("CVA"), an Article I court with jurisdiction limited to appeals of veterans' benefits claims. *See* Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, *reprinted in* 1988

U.S.C.C.A.N. 5795. The United States Court of Appeals for the Federal Circuit ("Federal Circuit") has direct and exclusive, but very narrow, appellate jurisdiction to review conclusions of law rendered by the CVA. *See* 38 U.S.C. § 7292 (1998).

Generally, once the appeals process is complete, decisions of the Secretary are final and may not be reconsidered. *See* 38 U.S.C. § 7104(b) (1998). However, there are three grounds on which a veteran may seek further consideration of a closed case. First, the veteran may show that there was a "clear and unmistakable error" in the decision in question. 38 U.S.C. §§ 5109A (error in regional office decisions), 7111 (error in BVA decisions) (1998). Second, the veteran may present "new and material evidence" sufficient to reopen the claim. 38 U.S.C. § 5108 (1998); 38 C.F.R. § 3.156 (1997). Finally, the Federal Circuit has held the language of § 7104(b) does not prevent consideration of a new claim based on earlier adjudicated facts, "wh[en] an intervening and substantive change in law or regulation [has] created a new basis for entitlement to a benefit." *Spencer v. Brown*, 17 F.3d 368, 372 (Fed.Cir. 1994), quoting with approval *Spencer v. Brown*, 4 Vet.App. 283, 289 (1993).

4. Brian E. Routen ("veteran" or "petitioner") entered military service with clear skin and was discharged because he suffered from psoriasis so severe that it made him unfit for further military duty. (Psoriasis is a skin disease characterized by scaly lesions. *Dorland's Illustrated Medical Dictionary* 1281 (25th ed. 1974).) Mr. Routen first attempted to enlist in the United States Navy in April 1977, but an enlistment physical examination determined that Mr. Routen suffered from psoriasis on

his shins and was not qualified for enlistment. Mr. Routen subsequently presented a letter from his attending physician, who stated that Mr. Routen did not suffer from psoriasis, but rather from "eczema, infected," and that the treatment course had been successful.

Mr. Routen was reexamined by the Navy in July 1977, and his prior enlistment physical was revised by the Navy doctor to correct the diagnosis from psoriasis to an episode of eczema. A contemporaneous medical examination found no skin condition present and found that Mr. Routen was fully qualified for service. Mr. Routen's medical record noted only: "Eczema, only episode, now clear." Another examination was conducted in December 1977, when Mr. Routen reported for military service, and the examiner again found no skin condition present.

In January 1978, while on active military duty, Mr. Routen complained of itchy, scaling skin, and in April 1978 he was diagnosed with psoriasis. Treatment continued for Mr. Routen's severe and widespread psoriasis for the remainder of his active military service. In September 1978 Mr. Routen's psoriasis was "still very active." A Medical Board review from September 1978 found that Mr. Routen was "unfit for further Naval Service by reason of a physical disability which was neither incurred in, nor aggravated by, a period of active military service." On October 2, 1978, Mr. Routen was discharged from the Navy because of his psoriasis.

The veteran initially filed a claim for service connection for a skin condition in 1979. When the regional office denied this initial claim, it failed even to mention the presumption of aggravation. The current appeal stems

from a September 1992 attempt by Mr. Routen to reopen his claim. The regional office denied Mr. Routen's claim on the grounds that the new evidence he had submitted did not show that his psoriasis was incurred in or aggravated by service. The regional office did not mention the fact that there was no evidence of record indicating that Mr. Routen's worsened condition during service was due to the natural progression of his disease, other than the conclusory September 1978 medical board finding.

Mr. Routen appealed to the BVA, and, when the BVA denied his claim, App. 43, appealed to the Court of Veterans Appeals. The CVA found that under § 5108, no new and material evidence had been submitted. App. 26-28. Although the Secretary urged the case be remanded because the 1992 amendment of § 3.306 constituted a liberalizing change in law under *Spencer*, the CVA declined to remand Mr. Routen's case, stating that Mr. Routen's psoriasis had not gotten worse during service and therefore, whether new or old, § 3.306 was "not applicable to the appellant's claim." App. 28-29. The CVA therefore did not even reach the question of whether the 1992 amendment to § 3.306 constituted a liberalizing change in law, and denied Mr. Routen's claim.

Mr. Routen appealed to the Federal Circuit. The Federal Circuit, interpreting § 5108, found that a change in legislation could never constitute new and material evidence. App. 9-14. This was a decision well within the jurisdiction of the Federal Circuit. However, the Federal Circuit also considered whether the 1992 change to § 3.306 constituted a "liberalizing change" as contemplated in *Spencer*. The Federal Circuit stated that the

Spencer intervening change rule had no basis in a "specific statutory provision," but then stated that "the logic of the intervening change rule, if it is to escape the bar of § 7104(b) [the finality provision], must be that the intervening change in law creates a new cause of action." App. 18. In other words, the Federal Circuit relied on an interpretation of § 7104(b) to hold that the 1992 change to § 3.306, requiring clear and convincing evidence to rebut the presumption of aggravation for veterans who served in peacetime after December 31, 1946, can never constitute liberalizing legislation for the purpose of reopening the claim, because that change is not a "substantive change in the law; that is, it does not create a new cause of action, since no new basis of entitlement is created." App. 17. Because of this decision, veterans who, like Mr. Routen, served during peacetime and exercised their right to apply for benefits before 1992, are now forever barred from having their claims considered under the proper standard, while other veterans who served during peacetime but waited to apply for compensation will receive the benefit of that proper standard. Therefore, while the court below affirmed the outcome of the Court of Veterans Appeals, the Federal Circuit based its ruling on different grounds than the Court of Veterans Appeals had based its ruling.

REASONS FOR GRANTING THE WRIT

When the Federal Circuit ruled that the 1992 change in an evidentiary standard cannot constitute a liberalizing change in the law sufficient to reopen the veteran's claim for benefits, it acted outside its jurisdiction, to the

extreme detriment of veterans. The petitioner asks that this Court grant certiorari and undo the Federal Circuit's extrajurisdictional action by holding that the Federal Circuit's finding is at best dicta and carries no force of law.

Federal courts of appeals are courts of limited jurisdiction. *See, e.g., Aldinger v. Howard*, 427 U.S. 1, 15 (1976). For any inferior court to exercise jurisdiction, that jurisdiction must have been conferred by an Act of Congress. *Finley v. United States*, 490 U.S. 545, 548 (1989). Inferior courts may not, even in the interest of justice, extend their jurisdiction where none exists. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988).

In particular, the Federal Circuit's jurisdiction in reviewing decisions of the CVA is "very limited." *Barnett v. Brown*, 83 F.3d 1380, 1383 (Fed.Cir. 1996). Specifically,

> If an appeal to [the Federal Circuit] from the Court of Veterans Appeals does not raise a constitutional question, a question as to the interpretation of a constitutional or statutory provision, or the interpretation or validity of a regulation relied upon by the Court of Veterans Appeals, section 7292(d) requires [the Federal Circuit] to dismiss the appeal for lack of jurisdiction.

Albun v. Brown, 9 F.3d 1528, 1530 (Fed.Cir. 1993). As well, the Federal Circuit may not review determinations as to factual matters. 38 U.S.C. § 7292(a) (1998). Most crucially for this case, the Federal Circuit may review only those statutes and regulations "relied on by the Court [of Veterans Appeals] in making [its] decision." *Id.*

In Mr. Routen's case, the Court of Veterans Appeals specifically declined to grapple with the question of

whether the new § 3.306 constituted liberalizing legislation. Instead, the CVA found that 38 C.F.R. § 3.306 was "not applicable to the appellant's claim." App. 29. Indeed, the Secretary had urged the CVA to remand the case to the BVA for de novo review in light of the change to § 3.306, but the CVA declined to do so because of its finding that Mr. Routen's condition had not worsened during service and that therefore § 3.306 did not even apply to the case. The CVA thus, obviously, did not reach the question of whether such a remand would ever be appropriate, and therefore did not ever reach the *Spencer* question. In fact, the CVA's majority opinion never even mentioned 38 U.S.C. § 7104(b), which was the basis for the Federal Circuit's decision.

When the Federal Circuit ruled based on § 7104(b), then, it exceeded its jurisdiction. First, it implicitly rejected the CVA's factual finding that 38 C.F.R. § 3.306 did not apply to Mr. Routen's case. But, as noted above, the Federal Circuit has no jurisdiction over factual matters. And, second, the Federal Circuit handed down an important interpretation of § 7104(b), a statute upon which the Court of Veterans Appeals did not rely in its decision.

The dissenting judge in the Federal Circuit acknowledged as much, writing that the Federal Circuit

> should be reluctant to define the scope of the 'liberalizing change' doctrine without guidance from the Court of Veterans Appeals, particularly in light of the fact that the General Counsel of the Department of Veterans Affairs interprets the doctrine in a manner at odds with the position taken by [the Federal Circuit].

App. 22. That judge recommended remanding the case to the CVA instead of deciding the issue without the CVA's analysis and without full briefing from both parties. App. 22. The dissenting judge's caution was not only legally but also practically sound, for the Federal Circuit's ultra vires action will have serious repercussions.

Indeed, if the Federal Circuit's decision is allowed to stand, it will, quite simply, deny benefits to veterans who are entitled to those benefits. The Federal Circuit acknowledged that had the new version of § 3.306 been in effect at the time Mr. Routen's claim was first considered, the outcome in Mr. Routen's case might have been different. But the Federal Circuit stated that "the issue in this case is not whether . . . Mr. Routen got a fair deal." App. 18. To the contrary, that is precisely what is at issue in this case: whether Mr. Routen, and other peacetime veterans who, like him, happened to file claims before 1992, got a fair deal.

This Court has repeatedly held that special consideration is to be accorded veterans of the United States Armed Forces. The Court has stated that when interpreting statutes, "the rule [is] that interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 117-118 (1994). *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-221, n. 9 (1994). *See also Fishgold v. Sullivan Drydock & Repair Corp., et al.*, 328 U.S. 275, 285 (1946) (stating that veterans benefits legislation "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 192 (1980); *Alabama Power Co. v. Davis*, 431 U.S. 581, 584-585 (1976).

As well, the VA benefits system "is designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters v. Nat. Assn. of Radiation Survivors*, 473 U.S. 305, 311 (1985). Moreover, "the VA is required to read any submission in the light most favorable to the claimant[.]" *Walters*, 473 U.S. at 329; *see* 38 C.F.R. § 3.102. When the Federal Circuit interpreted § 7104(b) – which was clearly outside the scope of its review – it explicitly discounted and trivialized the very concerns that should have been foremost on its mind: the veteran and his right to benefits.

This Court should make its decision with the best interests of the veteran in mind. In the words of Abraham Lincoln, words that are inscribed on the wall of the Department of Veterans Affairs building, the purpose of veterans' benefits is, quite simply, "to care for him who shall have borne the battle and for his widow and his orphan." Thus the Federal Circuit's decision, which it had no power to make and which denies benefits to a veteran for no reason more substantial than the date of his benefits application, should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be granted.

Respectfully submitted,

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United States Court of Appeals for the Federal Circuit

97-7064

BRIAN E. ROUTEN,

Claimant-Appellant,

v.

TOGO D. WEST, Secretary of Veterans Affairs,

Respondent-Appellee.

DECIDED: April 30, 1998

Gary L. Beaver, Patton, Boggs, & Blow, of Greensboro, NC, argued for appellant.

Armando O. Bonilla, Atty., Commercial Litigation Branch, Civil Div., U.S. Dept. of Justice, of Washington, DC, argued for appellee. With him on brief were *Frank W. Hunger*, Asst. Atty. Gen., *David M. Cohen*, Director, and *Anthony H. Anikeeff*, Asst. Director. Of counsel on brief were *Donald E. Zeglin*, Deputy Asst. Gen. Counsel, and *Nicole Sideris*, Atty., Dept. of Veterans Affairs, Office of General Counsel, of Washington, DC.

Appealed from: United States Court of Veterans Appeals

Judge Farley, III

Before PLAGER, BRYSON, and GAJARSA, *Circuit Judges*.

PLAGER, *Circuit Judge*.

This case addresses the circumstances under which a veteran may reopen or otherwise obtain reconsideration of a case previously closed. Brian E. Routen appeals the decision of the Court of Veterans Appeals, case No.

95-673 (Apr. 9, 1997), in which the court upheld the denial by the Board of Veterans Appeals ("Board") of Mr. Routen's application to reopen his claim for disability benefits. Because the establishment by the Department of Veterans Affairs ("VA") of a different evidentiary standard of proof for the Government to rebut a burden-shifting presumption relating to the presentation of evidence does not serve either as "new and material evidence" or as a substantive change in the law creating a new cause of action, we affirm.

BACKGROUND

In April 1977, Brian E. Routen attempted to enlist in the U.S. Navy. As a result of his enlistment examination, he was deemed medically ineligible to enlist due to psoriasis on his legs, a disqualifying skin disease. Following the submission of a letter from his personal physician noting that the rash was successfully treated and was just an "eczematous patch . . . with secondary infection," Mr. Routen's entrance medical examination record was changed from psoriasis to episodic eczema, and he entered the naval service. Mr. Routen served on active duty less than a year, from December 1977 to October 1978.

Not long after entering service, Mr. Routen complained of itchy, scaling skin. His condition was diagnosed by Navy doctors as psoriasis; he was treated for scaling on the knees, elbows, and palms, a condition which continued. Then, in September 1978, a Medical Board reviewing Mr. Routen's medical fitness for continued military service wrote that "[i]t is the opinion of the

Board that [Routen] . . . is unfit for further Naval Service by reason of a physical disability which was neither incurred in, nor aggravated by, a period of active military service." Based upon a finding that Routen had developed the disease two years before enlistment, the Board reported a final diagnosis of psoriasis vulgaris, concluding that the disease "[e]xisted prior to enlistment/Non-service aggravated." Mr. Routen was given a medical discharge from the Navy.

Not long thereafter, in January 1979, Mr. Routen filed a claim with the Veterans Administration for disability benefits based on his psoriasis, alleging that the disease was service connected. As a general matter, a veteran who has served in the armed forces during peacetime is entitled to compensation for a disability resulting from a disease contracted in the line of duty, or for aggravation of a preexisting disease caused in the line of duty. *See* 38 U.S.C. § 1131 (1994); 38 C.F.R. § 3.4(b) (1997). A veteran must establish service connection of the disability for entitlement to compensation. Service connection "may be accomplished by affirmatively showing inception or aggravation of the disability during service or through the application of statutory presumptions." 38 C.F.R. § 3.303 (1997).

On January 30, 1979, the Veterans Administration Regional Office ("VARO") denied Mr. Routen's claim with the notation that the psoriasis was "neither incurred in nor aggravated by his short period of active duty." Mr. Routen did not appeal from that determination; the decision became final.

Later in 1979, Mr. Routen again sought disability benefits for his skin condition. Treating his application as a request for reconsideration, the VARO, on July 10, 1979, again denied his claim. Some nine years later, in May 1988, Mr. Routen applied yet again for veterans benefits, and again the VARO denied his claim. The record does not indicate that any of these later denial decisions by the VARO were appealed.

Then in September 1992, Mr. Routen filed an application to reopen his claim. He presented medical treatment records documenting a long history of care for his psoriasis to establish service connection. *See* 38 C.F.R. § 3.303(a). The VARO in December 1992 denied Mr. Routen's application on the basis that he had not submitted new and material evidence. *See* 38 U.S.C. § 5108 (1994); 38 C.F.R. § 3.156. This time Mr. Routen appealed the determination of the VARO to the Board of Veterans Appeals.

The Board in April 1995 affirmed the decision of the VARO without reaching the merits of the claim, determining that the new records were not new and material for the purpose of reopening Routen's claim. The Board apparently did not consider the effect of a 1992 change in 38 C.F.R. § 3.306(b), which had the effect of raising the evidentiary burden required of the Government when it seeks to overcome the presumption of service-caused aggravation available to peacetime service veterans who demonstrate an increase during service of a pre-service disability.

On Mr. Routen's subsequent appeal to the Court of Veterans Appeals, that court affirmed the Board's decision, finding that neither the newly submitted medical records, nor the change in the presumption of aggravation rule constituted "new and material" evidence sufficient to reopen Routen's claim. This appeal followed.

DISCUSSION

I

This court has limited jurisdiction in reviewing decisions of the Court of Veterans Appeals. *See* 38 U.S.C. § 7292 (1994). With regard to the question of whether Mr. Routen's newly submitted medical records qualify as "new and material" evidence sufficient to reopen a claim pursuant to 38 U.S.C. § 5108, we are without jurisdiction. Viewed either as a factual determination or as an application of the law to the facts of a particular case, that is a question over which the Court of Veterans Appeals has final authority. *See* 38 U.S.C. § 7292(d)(2) (1994); *see also Spencer v. Brown*, 17 F.3d 368, 374 (Fed. Cir. 1994). We do, however, have jurisdiction to review the decision of the Court of Veterans Appeals with regard to its interpretation of the governing statutes and the 1992 change in the regulations regarding the presumption of aggravation made pursuant to those statutes. That review is independent and anew.

II

Mr. Routen's several claims during the 1970s and 1980s for disability benefits, beginning with the initial

claim in 1979, were all disallowed by the Veterans Administration. No appeals therefrom were taken, and they became final dispositions. Basic principles of finality and res judicata apply to such agency decisions. "A final and binding agency decision shall not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided [under the 'clear and unmistakable error' rule]." 38 C.F.R. § 3.104. *See also Astoria Fed. Savs. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-08 (1991) (allowing the application of res judicata to administrative agency determinations that have attained finality); *Barnett v. Brown*, 83 F.3d 1380, 1383-84 (Fed. Cir. 1996) (determining that the court lacked jurisdiction to review the Court of Veterans Appeals' decision affirming the Board's denial of Barnett's request to reopen her claim because no new and material evidence was presented); *Livingston v. Derwinski*, 959 F.2d 224, 225-26 (Fed. Cir. 1992) (finding no jurisdiction to review Livingston's allegation that the Court of Veterans Appeals misinterpreted the Board's finding of "no new factual basis" for refusing to reopen Livingston's claim). Unless otherwise provided by law, the cases are closed and the matter is thus ended.

Under existing law there are three grounds on which a veteran may seek further consideration of a previously closed case. The first ground, specified by statute, is to show that there was a "clear and unmistakable error" in the determination being reviewed. 38 U.S.C §§ 5109A (reviewing Secretary decisions) & 7111 (reviewing Board decisions) (Supp. IV 1998). The pertinent regulation specifically states: "Previous determinations which are final and binding . . . will be accepted as correct in the absence

of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended." 38 C.F.R. § 3.105(a) (1997).

A second ground, again statutory, under which a previously closed case may be reopened is to present "new and material evidence" sufficient to reopen the claim. "If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim." 38 U.S.C. § 5108 (1994). *See* 38 C.F.R. § 3.156 (1997).

Thirdly, as a matter of basic law, we have held that under appropriate circumstances an intervening change in the applicable law may entitle a veteran to receive consideration of a claim, even though the claim is based on essentially the same facts as those in a previously adjudicated claim. *See Spencer*, 17 F.3d at 372-73 (treating such a claim as new and thus avoiding the requirements for reopening under 38 U.S.C. § 5108). In this case, Mr. Routen raises grounds two and three, both, however, keyed to the existence of a new (1992) change in the level of proof required of the Government when it seeks to rebut a peacetime service veteran's presumption of aggravation of a pre-service disability.

III

VA law provides that, for veterans of both wartime and peacetime service, if a preexisting disease causes an increase in disability during a period of military service, it is presumed that the disease was aggravated by the active service. *See* 38 U.S.C. § 1153 (1994); 38 C.F.R.

§ 3.306(a) (1992). Thus, as previously noted, disability benefits would be allowable. In challenging entitlement to such an award, the Government may rebut the presumption by evidence that the increase in disability was due to the natural progression of the disease.

For wartime service veterans, rebutting the presumption requires the Government to make a specific showing, based on "clear and unmistakable evidence," that the increase in disability was due to the natural progress of the disease. *See* 38 C.F.R. § 3.306(b) (1992). For peacetime service veterans, on the other hand, prior to 1992 the presumption could be rebutted by presenting "available evidence of a nature generally acceptable as competent" showing that the increase in severity was due to the normal progression of the disease. *See* 38 C.F.R. § 3.306(c) (1992). In 1992, the VA amended the regulation to extend the "clear and unmistakable evidence" rebuttal standard to veterans with peacetime service after December 31, 1946; the regulation's effective date was May 1, 1974. *See* 57 Fed. Reg. 59,296 (1992).[1]

Mr. Routen argues that the change in the evidentiary standard for rebutting the presumption is now applicable to his case, and that it constitutes "new and material evidence" on the basis of which his case should have been reopened. The Court of Veterans Appeals determined that a change in a burden-shifting presumption

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[1] The purpose of the change was to bring § 3.306 into consonance with earlier changes made by Congress in the statutory provision regarding the presumption of sound condition upon entry into active duty. *See* 38 U.S.C. § 1137 (1994).

such as this does not constitute "new and material evidence" as that term is understood under 38 U.S.C. § 5108. The correctness of that determination is the question to which we now turn.

IV

The decision by the Court of Veterans Appeals in *Akins v. Derwinski*, 1 Vet. App. 228 (1991), is the primary authority for the proposition that failure to apply an evidentiary presumption may serve as "new and material evidence" to reopen a claim. In *Akins*, the VARO failed to properly apply the presumptions of soundness upon enlistment and of service-connection for aggravated conditions when denying the veteran's claim for benefits. The Court of Veterans Appeals held that those presumptions provided the evidentiary foundation upon which the veteran's claim stood, and, unless rebutted by the Government, entitled the veteran to a decision in his favor. Failure to have given the veteran the benefit of the presumptions was clear and unmistakable error; the initial decision denying benefits was reversed and remanded.

In the course of its opinion, the Court of Veterans Appeals noted that "the factual predicate demonstrated by the presumptions have an important evidentiary value and, to that extent, are the functional equivalent of evidence." *Id.* at 230. Hence, the failure to apply the presumptions provided a basis for reopening the claim. The court then cited a Court of Veterans Appeals case, indicating that it involved "new and material evidence," as

well as 38 C.F.R. § 3.156(a) (defining "new and material"). *Id.*

But the *Akins* decision did not involve the question of reopening a case based on new and material evidence. As the court stated, "[o]n appeal . . . appellant contended that the denial of his original claim . . . was clear and unmistakable error." *Id.* at 228. The court's conclusion was that there was such error, an independent ground for correction unrelated to the "new and material evidence" rule. The *Akins* court specifically noted that the appellant chose to demonstrate clear and unmistakable error, presumably in order to gain entitlement to benefits dating back to his original claim, *see* 38 C.F.R. § 3.105(a), rather than just to the date of reopening, *see* 38 U.S.C. § 5110. *See Akins*, 1 Vet. App. at 231 (citing 38 U.S.C. § 3010 which was renumbered § 5110 by Pub. L. No. 102-40, 105 Stat. 187 (1991)).

This court has never treated a presumption as any form of evidence. *See, e.g., A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1037 (Fed. Cir. 1992) ("[A] presumption is not evidence."); *see also Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935) ("[A presumption] cannot acquire the attribute of evidence in the claimant's favor."); *New York Life Ins. Co. v. Gamer*, 303 U.S. 161, 171 (1938) ("[A] presumption is not evidence and may not be given weight as evidence."). Although a decision of this court, *Jensen v. Brown*, 19 F.3d 1413, 1415 (Fed. Cir. 1994), dealing with presumptions in VA law is cited for the contrary proposition, the *Jensen* court did not so decide.

Jensen involved an appeal from the Court of Veterans Appeals regarding the validity of a regulation creating a

special presumption relating to aggravation of preexisting conditions during combat, and its application to the case of the appellant veteran. The question was whether the agency had misapplied the presumption. The Court of Veterans Appeals had held that the regulation was invalid as conflicting with governing statutes, and thus the question of misapplication was moot.

In the course of its review of the Court of Veterans Appeals decision, the *Jensen* court noted that the Court of Veterans Appeals had held that "the misapplication of, or in this case the alleged complete failure to apply, an evidentiary regulation may be a form of new and material evidence sufficient to reopen a claim." *Jensen*, 19 F.3d at 1415. The court cited *Corpuz v. Brown*, 4 Vet. App. 110 (1993), a 1993 Court of Veterans Appeals decision which, in turn, had cited and discussed *Akins*. The *Jensen* court then stated that "[f]or present purposes, we accept this conclusion." *Jensen*, 19 F.3d at 1415.

Thus the *Jensen* court simply assumed that the case before it had been properly "reopened" in accordance with established VA procedures, and proceeded with its review regarding the validity of the regulation at issue. The *Jensen* court concluded that the regulation was valid, reversed the decision of the Court of Veterans Appeals, and remanded the case. On remand, the Court of Veterans Appeals stated that "[i]t appears that the Federal Circuit in reversing this Court has determined, as a matter of law, that 38 C.F.R. § 3.306(b)(2) constituted 'new and material' evidence, and that appellant's claim must be reopened." 7 Vet. App. 27, 28 (1994). With due respect to the Court of Veterans Appeals, this reads more into the decision than was there.

Today we address the issue directly, and hold that the misapplication of, or failure to apply, a statutory or regulatory burden-shifting presumption does not constitute "new and material evidence" for the purpose of reopening a claim under 38 U.S.C. § 5108. As earlier noted, a change in the evidentiary standard required to rebut a presumption such as the one at issue here is not considered "evidence" by this court, because the presumption itself never was evidence. *See A.C. Aukerman*, 960 F.2d at 1037; *see also* Michael H. Graham, 1 *Handbook of Federal Evidence*, § 301.10 at 156-57 & nn.1-3 (4th ed. 1996) ("[I]t is now universally recognized that a presumption is a rule of law for the handling of evidence, not a species of evidence."); Ronald J. Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions – An Anatomy of Unnecessary Ambiguity and a Proposal for Reform*, 72 Nw. U.L. Rev. 892, 903 (1982) ("Presumptions are not evidence – they are labels applied to decisions about evidentiary matters.").

The presumption affords a party, for whose benefit the presumption runs, the luxury of not having to produce specific evidence to establish the point at issue. When the predicate evidence is established that triggers the presumption, the further evidentiary gap is filled by the presumption. *See* 1 *Weinstein's Federal Evidence* § 301.02[1], at 301-7 (2d ed. 1997); 2 *McCormick on Evidence* § 342, at 450 (John W. Strong ed., 4th ed. 1992). However, when the opposing party puts in proof to the contrary of that provided by the presumption, and that proof meets the requisite level, the presumption disappears. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1980); *A.C. Aukerman*, 960 F.2d at 1037

("[A] presumption . . . completely vanishes upon the introduction of evidence sufficient to support a finding of the nonexistence of the presumed fact."); *see also Weinstein's Federal Evidence* § 301App.100, at 301App.-13 (explaining that in the "bursting bubble" theory once the presumption is overcome, then it disappears from the case); 9 *Wigmore on Evidence* § 2487, at 295-96 (Chadbourn rev. 1981). *See generally* Charles V. Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 Mich. L. Rev. 195 (1953).

The party originally favored by the presumption is now put to his factually-supported proof. This is because the presumption does not shift the burden of persuasion, and the party on whom that burden falls must ultimately prove the point at issue by the requisite standard of proof. *See* Fed. R. Evid. 301; *A.C. Aukerman*, 960 F.2d at 1038-39. *But see McCormick on Evidence* § 344, at 470-72 (describing an alternative to the bursting bubble rule in which application of a presumption shifts the burden of persuasion); Edmund M. Morgan, *Presumptions*, 12 Wash. L. Rev. 225 (1937).

Here, the question is what evidence constitutes "new and material evidence" entitling a petitioner to reopen a previously decided and closed case. By its terms, § 5108 requires "evidence," which the regulations describe as "evidence not previously submitted to agency decision-makers which bears directly and substantially upon the specific matter under consideration, [and] which is neither cumulative nor redundant." 38 C.F.R. § 3.156(a) (1997). Once new and material factual *evidence* is presented that warrants reopening of the case, the presumption may well result in a decision in favor of the veteran.

But that is a matter that goes to the merits of the case, not one that goes to the question of whether the rules of finality are overcome.[2]

V

Mr. Routen also contends that the 1992 change extending the presumption of aggravation to peacetime service veterans was "liberalizing," entitling him to reconsideration of his claim under *Spencer v. Brown*, 17 F.3d 368 (Fed. Cir. 1994). In *Spencer*, this court held that, upon a showing of a new basis of entitlement to a claimed benefit as a result of an intervening change in law or regulation, 38 U.S.C. § 7104(b) does not preclude consideration of the claim even though based on facts in a previously and finally denied claim. *See* 17 F.3d at 373. The *Spencer* court quoted with approval the Court of Veterans Appeals' reasoning:

> When a provision of law or regulation creates a new basis of entitlement to benefits, as through liberalization of the requirements for entitlement to a benefit, an applicant's claim of entitlement under such law or regulation is a claim separate and distinct from a claim previously

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[2] *Accord* Vet. Aff. Op. Gen. Couns. Prec. 38-97, 1997 WL 796591 (reaching the same conclusion for four reasons: (1) a presumption is not evidence, (2) misapplication or failure to apply a pertinent statute or regulation is really "clear and unmistakable error," (3) *Akins* and *Corpuz* are not binding precedent for the proposition that a misapplied presumption may serve as "new and material" evidence under § 5108, and (4) the Federal Circuit did not decide the issue as a matter of law in *Jensen*).

> and finally denied prior to the liberalizing law or regulation. The applicant's later claim, asserting rights which did not exist at the time of the prior claim, is necessarily a different claim.

Id. at 372 (quoting *Spencer v. Brown*, 4 Vet. App. 283, 288-89 (1993)). The *Spencer* court then analyzed whether or not the Veterans' Judicial Review Act of 1988 ("VJRA") represented a "liberalizing law," using the definition: "one which brought about a substantive change in the law creating a new and different entitlement to a benefit." *Id.* The court concluded that the VJRA changes were "unmistakably procedural in nature . . . directed to improving the adjudicative process and did not create new substantive rights to veterans' benefits." *Id.*

There is no statutory basis for review of a previously adjudicated claim following an intervening change in the law. On the contrary, 38 U.S.C. § 7104(b) states:

> Except as provided in section 5108 of this title [dealing with reopening of disallowed claims on the grounds of new and material evidence], when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered.

The apparent basis for the assumption that a claim may be reconsidered under a "liberalizing" intervening law, even though grounded on the same factual basis, is 38 U.S.C. § 5110(g) and its implementing regulations, including 38 C.F.R. § 3.114(a). However, § 3.114 addresses a different issue. It sets the effective date of awards made pursuant to a "liberalizing law, or a liberalizing VA issue approved by the Secretary"; the regulation does not

define "liberalizing." The statutory authority cited for § 3.114, 38 U.S.C. § 5110(g), is part of a statutory section that deals with the effective dates of awards, and, with regard to compensation and pension claims, sets the effective date for awards or increases made "pursuant to any Act or administrative issue." The statute says nothing about "liberalizing" laws.

In *Spencer*, this court accepted the Court of Veterans Appeals' view that the preclusive language of § 7104(b) does not prevent consideration of a new claim based on earlier adjudicated facts, "wh[en] an intervening and substantive change in law or regulation created a new basis for entitlement to a benefit." *Id.* at 372 (quoting the Court of Veterans Appeals). There is a good argument that, if a new law provides for benefits not previously available, even though grounded on some but not all of the same facts adjudicated under an earlier law, a new cause of action is created along with a new entitlement to a remedy. Thus, if the old law required proof of facts A, B, and C, and the new law requires proof of facts A, B, and D, a veteran who lost the A, B, C case under the old law because he could not establish C would seem free to claim under the new law, assuming he can establish A, B, and D.

In *Spencer*, the court went on to analyze whether the statute being pressed by the appellant was a law that created a new basis for entitlement, and concluded that it was not. The court explained that:

> Spencer's argument fails to appreciate that the reforms implemented by the VJRA were directed to improving the adjudicative process and did not create new substantive rights to

> veterans' benefits. . . . Spencer does not identify any changes effected by the VJRA that *substantively* affected the nature of his claim such that it became different and distinct from the one previously denied by the Board.

Id. at 372-73.

In our case, the regulation at issue now provides that the presumption of aggravation is rebutted by "clear and unmistakable evidence . . . where the preservice disability underwent an increase in severity during service." 38 C.F.R. § 3.306(b) (1997). This change in the evidentiary standard required to rebut the presumption is procedural in nature. Changing the Government's evidentiary standard for peacetime service veterans does not effect a substantive change in the law; that is, it does not create a new cause of action, since no new basis of entitlement is created. The peacetime service veterans simply benefit from a stronger presumption toward the same ultimate disability benefit entitlement, based on the same factual predicates.

The dissent would have us remand this issue to the Court of Veterans Appeals to determine whether the difference in evidentiary standard "is enough to make the 1992 change a 'liberalizing change' of the sort that entitles a veteran such as Mr. Routen an opportunity to renew his application for disability benefits." Slip op. at 3. As explained above, this difference cannot be considered an intervening change because it failed to effect a substantive change in the law. Thus, the dissent's argument only makes sense if, despite the express prohibition of § 7104(b), a non-substantive but "liberalizing change"

was considered a fourth ground for reopening an otherwise final determination having the same factual basis. Or, alternatively, if such a change in an evidentiary presumption creates a new cause of action. For the reasons we have explained, neither of those conditions exists.

It is certainly possible that had the new presumption standard been in effect and applied at the time Mr. Routen's claim was first considered, the outcome in his case might have been different. But the issue in this case is not whether on the merits Mr. Routen got a fair deal, but whether the deal he got is now subject to being revisited years later. The finality rule, § 7104(b), says no. The exceptions provided by law – clear and unmistakable error; new and material evidence; an intervening change in law providing a new cause of action – are, for the reasons we have explained, inapplicable.

With regard to the third exception, for which, unlike the other two, there is no specific statutory provision, the logic of the intervening change rule, if it is to escape the bar of § 7104(b), must be that the intervening change in law creates a new cause of action. Otherwise, every time Congress amends a benefit statute or the agency changes a regulation to make it easier to prove entitlement, any claimant who previously was denied a benefit could reopen the claim. Such a rule would *sub rosa* repeal the requirement that to reopen a final decision the claimant must show either clear and unmistakable error or new and material evidence. The so-called "liberalizing change" cannot mean what Mr. Routen wishes it to mean, or what the dissent assumes it means.

In short, on the facts of this case, the Court of Veterans Appeals correctly determined that there has been no substantive change in the law creating a new cause of action. A remand to that court is unnecessary and unwarranted since there is no legal ground on which that court could hold otherwise.

VI

Finally, to the extent that Mr. Routen argues on appeal that, relying on the medical records, no specific factual finding was made by the VARO, the Board, or the Court of Veterans Appeals regarding whether or not his condition was worsened by his service, this court lacks jurisdiction to review the issue. This argument presupposes fact finding and application of law to facts, and is another way of suggesting that the presumption of aggravation should have been applied in Mr. Routen's case. However, unless Mr. Routen is able to reopen his claim by showing clear and unmistakable error, or by presenting new and material evidence, the issue of whether or not the presumption of aggravation applies cannot be addressed.

CONCLUSION

The judgment of the Court of Veterans Appeals is *AFFIRMED*.

BRYSON, *Circuit Judge*, concurring in part and dissenting in part.

I agree with the court that the 1992 change in the application of the presumption of aggravation to peacetime veterans does not constitute "new and material evidence" within the meaning of 38 U.S.C. § 5108. I part company with the court, however, with respect to its ruling that the 1992 change cannot constitute a "liberalizing change" in the law that creates a new basis of entitlement and thus permits the veteran to make a new claim for benefits. Because the Court of Veterans Appeals did not address the "liberalizing change" issue (even though it was presented by the parties), I would not resolve the issue but would remand this case to the Court of Veterans Appeals for that court to address the issue in the first instance.

In *Spencer v. Brown*, 17 F.3d 368, 372-73 (Fed. Cir. 1994), this court held that when an intervening liberalization in law or regulation substantively affects a veteran's claim, the veteran is entitled to de novo consideration of the claim. The court today apparently reaffirms *Spencer*, but it holds that the "liberalizing change" doctrine does not apply to an evidentiary presumption such as the one at issue in this case. The court reasons that the "liberalizing change" doctrine applies only to substantive changes in eligibility requirements that "create a new cause of action," and not to procedural changes regarding the manner in which disability claims are resolved. I am not prepared to embrace the "substantive-procedural" distinction as the basis for defining the "liberalizing change" doctrine, and I am not certain what the court means when it states that a "liberalizing change" must be a change that "creates a new cause of action." I suspect that the court uses the term "new cause of action" to refer to a

change in law that the court would recognize as sufficient to avoid the bar of finality. If so, the use of the "new cause of action" standard contributes nothing to the analysis.

Prior to December 1992, both wartime and peacetime veterans were entitled to a presumption of aggravation (*i.e.*, that any increase in a preexisting disability was caused *by* military service), if they were able to show that the disability underwent an increase in severity *during* service. For both classes of veterans, the presumption could be rebutted by a showing that the increase in disability was due to the natural progression of the disease or condition. *See* 38 C.F.R. § 3.306(a) (1992). For peacetime veterans, the presumption could be rebutted simply by showing that any increase in severity of the disability was "that normally to be expected by reason of the inherent character of the condition." 38 C.F.R. § 3.306(c) (1992). For wartime veterans, however, the presumption of aggravation could be rebutted only by a showing of "clear and unmistakable evidence," a significantly higher burden of proof. 38 C.F.R. § 3.306(b) (1992). Following the 1992 amendment to 38 C.F.R. § 3.306, clear and unmistakable evidence was required to rebut the presumption in favor of both wartime and peacetime veterans. *See* 38 C.F.R. § 3.306(b) (1997).

As a result of the 1992 change, some peacetime veterans whose service connection claims would have failed under the earlier "preponderance" standard will prevail under the "clear and unmistakable evidence" standard. Whether that difference is enough to make the 1992 change a "liberalizing change" of the sort that entitles a veteran such as Routen an opportunity to renew his

application for disability benefits is an issue that would benefit from analysis by the Court of Veterans Appeals before we decide it. We should be reluctant to define the scope of the "liberalizing change" doctrine without guidance from the Court of Veterans Appeals, particularly in light of the fact that the General Counsel of the Department of Veterans Affairs interprets the doctrine in a manner at odds with the position taken by this court today. *See* Vet. Aff. Op. Gen. Couns. Prec. 26-97, 1997 WL 465956 (Jul. 16, 1997) (change liberalizing the evidentiary basis on which the entitlement to a benefit could be established may constitute a liberalizing change). I would therefore remand this case to the Court of Veterans Appeals to allow that court to address the "liberalizing change" issue directly rather than deciding the issue without the benefit of the analysis of the Court of Veterans Appeals and full briefing from the parties.

Brian E. ROUTEN, Appellant,

v.

Jesse BROWN, Secretary of Veterans Affairs, Appellee.

No. 95-673.

United States Court of Veterans Appeals.

April 9, 1997.

Craig M. Kabatchnick was on the pleadings for appellant.

Mary Lou Keener, General Counsel; Ron Garvin, Assistant General Counsel; R. Randall Campbell, Deputy Assistant General Counsel; and Leonard Vecchiollo, Washington, DC, were on the pleadings for appellee.

Before FARLEY, HOLDAWAY, and STEINBERG, Judges.

FARLEY, Judge, filed the opinion of the Court. STEINBERG, Judge, filed a dissenting opinion.

FARLEY, Judge:

This is an appeal from an April 4, 1995, decision of the Board of Veterans' Appeals (BVA or Board) which determined that new and material evidence had not been submitted to reopen the appellant's claim for service connection for psoriasis. The appellant filed a motion to remand, or for acceptance of the motion in lieu of a brief, and for a stay of proceedings. The Secretary filed a response contesting the grounds upon which the appellant proposes a remand, but requesting a remand on a

separate ground. This appeal is timely and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). For the reasons that follow, the Court will deny the motions for remand, accept the motions in lieu of briefs, and affirm the Board's decision.

I.

The appellant served on active duty in the U.S. Navy from December 1977 to October 1978. Record (R.) at 56. He had attempted to join in April 1977 but was disqualified for service due to psoriasis on both legs. R. at 19-20. In July 1977, the appellant's private physician wrote a letter stating that he had been treating the appellant for the rash on his legs and believed it to be an "eczematous patch . . . with some secondary infection." R. at 23. His service entrance examination was changed to read "eczema, only episod[ic], now clear." R. at 20.

While in service, the appellant was treated for scaling on the knees, elbows, and palms (see R. at 19-54) and was subsequently diagnosed with psoriasis (R. at 34). He continued to suffer from psoriasis throughout service, though it improved slightly. Finally, in September 1978, a navy physician recommended discharge, noting that the appellant's psoriasis was not aggravated in service. R. at 44. A September 1978 report by the medical board rendered a final diagnosis of psoriasis vulgaris and found that the condition had existed prior to service and was not aggravated in service. R. at 50. The report noted that the appellant had stated that he had developed this problem approximately two years prior to enlistment in the

Navy. R. at 49. The appellant was subsequently discharged.

In January 1979, the appellant filed a claim for service connection for psoriasis. R. at 58. Later that month, the VA regional office (RO) issued a rating decision denying the appellant's claim. The RO noted that the appellant's condition was neither "incurred in nor aggravated by his short period of active duty." R. at 61. The RO found that psoriasis was noted on the entrance examination and that the appellant had a history of treatment prior to service and shortly after entry into service. *Ibid.* The RO's decision was confirmed in July 1979 and became final.

The appellant sought to reopen his claim in May 1988, and was advised to submit new and material evidence related to the issue of aggravation in service. In September 1992, the appellant submitted medical records in support of his claim. R. at 87-126. The post-service medical records showed diagnoses of and treatment for psoriasis, which often was quite severe. In December 1992, the RO confirmed its previous rating decision after finding that the newly submitted medical records did not show that the appellant's psoriasis was incurred in or aggravated by service. R. at 130.

In May 1993, the appellant filed an appeal with the BVA. R. at 149. The Board found that the "[e]vidence received since the January 1979 unappealed rating decision is not new and material to reopen the [appellant's] claim [for] service connection for psoriasis." The appellant thereafter appealed to this Court.

II.

The Secretary shall reopen a previously disallowed claim upon the presentation by the claimant of new and material evidence. 38 U.S.C. § 5108. The issue of whether evidence is new and material is a conclusion of law which the Court reviews de novo. *Beausoleil v. Brown*, 8 Vet.App. 459, 463 (1996). The Secretary must perform a two-step analysis when a veteran seeks to reopen a final decision based on new and material evidence. *Manio v. Derwinski*, 1 Vet.App. 140, 145 (1991). First, it must determine whether the evidence presented or secured since the last final disallowance is "new and material." *Ibid; see also Edenfield v. Brown*, 8 Vet.App. 384, 389-90 (1995) (en banc) (holding that a denial on the merits and a determination that a claim is not well grounded both constitute a "disallowance" of a claim). If it is, the Board must then reopen the claim and review the new evidence "in the context of" the old to determine whether the prior disposition of the claim should be altered. *Manio*, 1 Vet.App. at 145; *Jones v. Derwinski*, 1 Vet.App. 210, 215 (1991).

In *Evans v. Brown*, 9 Vet.App. 273, 283 (1996), this Court stated that step one of the *Manio* two-step process, the determination of whether the evidence is new and material, involves three questions. The first question is whether the newly presented evidence is actually "new" in the sense that it was not of record at the time of the last final disallowance of the claim and is not merely cumulative of other evidence of record. *Ibid.; Struck v. Brown*, 9 Vet.App. 145, 151 (1996). The second question is whether the evidence is "probative" of the "issue at hand." *Evans*, 9 Vet.App. at 283. Evidence is "probative" when it "tend[s] to prove, or actually prov[es] an issue." BLACK'S

LAW DICTIONARY 1203 (6th ed. 1990). The third question is whether, in light of all of the evidence of record, there is a reasonable possibility that the outcome of the claim on the merits would be changed. *Dolan v. Brown*, 9 Vet.App. 358, 361 (1996); *Evans*, 9 Vet.App. at 283. Affirmative answers to both materiality questions are required in order for "new" evidence to be "material." *Ibid.*; *Blackburn v. Brown*, 8 Vet.App. 97, 102 (1995). As to those two "materiality" components, the evidence is presumed credible for the purpose of determining whether the case should be reopened. *Justus v. Principi*, 3 Vet.App. 510, 513 (1992).

The issue in this case is whether the appellant's condition began during service or was aggravated by service. The evidence submitted since the last final disallowance in 1979 includes post-service medical records and the appellant's own statements. While the medical records show post-service diagnoses of psoriasis, often severe, none of this evidence relates the appellant's condition to his service. In addition, the medical reports show that none of the treating physicians opined that the psoriasis had worsened during service. As a result, this newly submitted evidence is not probative of the issue at hand and therefore does not constitute new and material evidence. *See Evans, supra.*

The appellant's own statements that his condition worsened in service are also not probative of the issue at hand. Lay assertions of medical causation, or in this case, of aggravation of a preexisting disease, cannot suffice to reopen a claim under 38 U.S.C. § 5108. *Wilkinson v. Brown*, 8 Vet.App. 263, 268 (1995); *see also Moray v. Brown*, 5 Vet.App. 211, 214 (1993). While the appellant is certainly

capable of providing evidence of symptomatology, a lay-person is generally not capable of opining on matters requiring medical knowledge, such as the condition causing or aggravating the symptoms. *See Stadin v. Brown*, 8 Vet.App. 280, 284 (1995); *Robinette v. Brown*, 8 Vet.App. 69, 74 (1995).

The appellant also contends that the Board erred by not addressing the presumption of soundness under 38 C.F.R. § 3.304(b) and the presumption of aggravation of a preexisting disease under 38 C.F.R. § 3.306. However, the Board was not required to reach these issues unless the claim was reopened. *Cf. Annoni v. Brown*, 5 Vet.App. 463, 467 (1993) (where Court held that benefit of the doubt doctrine does not apply when appellant fails to fulfill threshold burden of submitting new and material evidence); *Gilbert v. Derwinski*, 1 Vet.App. 49, 55 (1990). Since the Court finds that the appellant has not submitted new and material evidence to reopen his claim, these issues will not be addressed here.

III.

In his response the Secretary argues that the BVA decision should be summarily affirmed. Appellee's Response at 7. However, in that same pleading, the Secretary also moves for a remand of the claim to allow de novo review by the BVA in light of a 1992 change in 38 C.F.R. § 3.306(b). The regulation was changed to establish, in certain circumstances, a presumption of aggravation which can only be rebutted by clear and unmistakable evidence. The Secretary, citing *Spencer v. Brown*, 4 Vet.App. 283 (1993), contends that this change in the

regulation may give rise to a new entitlement, thus requiring its application to the appellant's claim. However, while it does appear that a change in a law or regulation can constitute new and material evidence under appropriate circumstances, *see Jensen v. Brown*, 19 F.3d 1413 (Fed.Cir.), *on remand*, 7 Vet.App. 27, 28 (1994), the record before the Court compels the conclusion that this appeal does not present such circumstances.

Section 3.306(a) of Title 38, Code of Federal Regulations, provides:

> A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, *where there is an increase in disability during such service*, unless there is a specific finding that the increase in disability is due to the natural progression of the disease.

(Emphasis added). In *Falzone v. Brown*, the Court held that the presumption of aggravation created by 38 C.F.R. § 3.306 applies only if there is an increase in severity during service. 8 Vet.App. 398, 402 (1995). The Board found as a matter of fact that the newly submitted records "do not show that there was an increase in the severity of [the appellant's] psoriasis" during service. R. at 6. There is a plausible basis in the record for the Board's finding of fact. *See Gilbert*, 1 Vet.App. at 53 (Court cannot overturn factual determinations of the BVA if there is a plausible basis in the record for such determinations). Therefore, the regulation is not applicable to the appellant's claim and the Secretary's motion to remand the claim to the BVA for de novo review in light of the change in 38 C.F.R. § 3.306 will be denied.

IV.

Upon consideration of the record, the appellant's motion for remand accepted by the Court in lieu of a brief, and the Secretary's response, also accepted in lieu of a brief, the Court holds that the appellant has not demonstrated that the Board committed either factual or legal error which would warrant reversal or remand. *Gilbert, supra; see also Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *Danville Plywood Corp. v. United States*, 899 F.2d 3 (Fed.Cir.1990). The Court also is satisfied that the BVA decision meets the "reasons or bases" requirements of 38 U.S.C. § 7104(d)(1), and the benefit of the doubt doctrine of 38 U.S.C. § 5107(b). *See Gilbert, supra.* Accordingly, the appellant's motion for remand is denied, the Secretary's motion for remand on other grounds is denied, and the April 4, 1995, decision of the Board of Veterans' Appeals is AFFIRMED.

STEINBERG, Judge, dissenting:

In light of the Court's current precedential authority, I dissent from the result reached in the majority opinion and specifically its holdings (1) that new and material evidence has not been submitted to reopen the claim for service connection for psoriasis, and (2) that the 1992 change in 38 C.F.R. § 3.306(b), making available the presumption of aggravation to claims filed by veterans who served during peacetime after December 7, 1941, was not invoked so as to apply to the appellant's claim because new and material evidence showing an increase in the severity of the appellant's condition had not been presented and thus that a remand to the Board of Veterans'

Appeals (BVA or Board), as proposed by both parties, is not required. I would likely concur in the majority's position – were I to reach the question at this point – that the Board was not required to address the presumptions of soundness under 38 C.F.R. § 3.304(b) and of aggravation under 38 C.F.R. § 3.306 unless the claim was reopened.

I cannot join in the majority's opinion as to the first two holdings because the majority ignores the Court's opinions in *Akins v. Derwinski*, 1 Vet.App. 228, 230 (1991), a case specifically relied upon by the appellant (Motion for Remand at 19; Reply at 4) and clearly relevant to the issue here, and in *Townsend v. Derwinski*, 1 Vet.App. 408, 410 (1991), also clearly relevant to that issue, and because the majority opinion fails to explain how it reached its conclusion that new and material evidence was required on the issue of aggravation before the presumption of aggravation would be applicable even where the 1979 final Department of Veterans Affairs (VA) regional office (RO) decision had not considered that presumption and the April 1995 Board decision here on appeal also did not consider that new presumption in adjudicating the appellant's claim.

I. Presumption as Evidentiary Basis for Reopening

The issue whether the new presumption of aggravation can alone be a basis for reopening a claim is one that is glossed over by the majority but requires detailed consideration. In *Akins*, the Court noted that "the factual predicate demonstrated by the presumptions [of sound

condition and aggravation] have an important evidentiary value and, to that extent, are the functional equivalent of evidence". *Akins*, 1 Vet.App. at 230. The Court held that the presumption of sound condition "provides a basis for reopening the claim" when it is "clear that this evidentiary presumption was not previously considered" and "bears directly and substantially on the issue of entitlement to service connection". *Ibid.*[1] This conclusion in *Akins* was then accepted by the United States Court of Appeals for the Federal Circuit in *Jensen v. Brown*, when that Court stated that "the misapplication of, or . . . the alleged complete failure to apply, an evidentiary regulation may be a form of new and material evidence sufficient to reopen a claim". *Jensen*, 19 F.3d 1413, 1415 (Fed.Cir.1994) (citing, *e.g.*, *Corpuz v. Brown*, 4 Vet.App. 110, 113 (1993)). The Court there noted that section 1153 "explains that 'aggravation' requires some increase in the severity of the preexisting condition causally related to military service" and that that statute was "silent about the method or level of proof necessary to establish an increase in severity". *Id.* at 1416. The Federal Circuit noted that the Secretary has the "authority to set out regulations to create rules of evidence directed at the nature and level of proof required to satisfy the substantive requirements of service-connection" and that "[o]ne method is a showing of aggravation". *Jensen*, 19 F.3d at

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[1] The Court in *Akins v. Derwinski* found that the claim had been properly reopened by a Department of Veterans Affairs (VA) regional office (RO) in 1988 or 1989, but the Court ended up disposing of the case on the ground that clear and unmistakable error had been committed by a 1946 VARO decision. *Akins*, 1 Vet.App. 228, 231-33 (1991).

1416. Although both *Akins* and *Jensen* establish that the presumption of aggravation can be the evidentiary basis for reopening, those cases do not explain the circumstances that must exist for that to be the case.

II. Law on Reopening

The Court's caselaw requires that when there has been a prior disallowance of a claim, new and material evidence is needed before that issue can be revisited. *See Evans v. Brown*, 9 Vet.App. 273 (1996). Under the applicable law, the Secretary must reopen a prior final disallowance of a claim when "new and material evidence" is presented or secured with respect to the basis for the disallowance of that claim. *See* 38 U.S.C. §§ 5108, 7104(b), 7105(c). On a claim to reopen, a "two-step analysis" must be conducted under section 5108. *Manio v. Derwinski*, 1 Vet.App. 140, 145 (1991). The first step involves a determination as to whether the evidence presented or secured since the last final disallowance of the claim is new and material. *See Evans*, 9 Vet.App. at 283; *Blackburn v. Brown*, 8 Vet.App. 97, 102 (1995); *Cox v. Brown*, 5 Vet.App. 95, 98 (1993); *Colvin v. Derwinski*, 1 Vet.App. 171, 174 (1991). In *Evans*, the Court has broken down this first step into a three-question inquiry: The first question is whether the newly presented evidence is actually "new" in the sense that it was not of record at the time of the last final disallowance (on any basis – merits or otherwise) of the claim and not merely cumulative of other evidence that was then of record. *Evans*, 9 Vet.App. at 283. The second question is whether the "new" evidence is probative of (tends to prove) the "issue[s] at hand" (each issue that was a specified basis for the last final disallowance of the

claim). *Ibid.* The third question is whether, if the evidence is new and probative, then, in light of all of the evidence of record, there is a reasonable possibility that the outcome of the claim on the merits would be changed. *Ibid.* Affirmative answers to both materiality questions are required in order for "new" evidence to be "material". *Ibid.*

As to those two "materiality" components, the credibility of the newly presented evidence is generally presumed. *Ibid.; see also Justus v. Principi,* 3 Vet.App. 510, 513 (1992). Also, in looking at the first materiality component (whether the evidence found to be "new" is also probative), "the focus is on the new evidence; as to the second materiality component (whether there is a reasonable possibility that the outcome on the merits would be changed), the focus is on all of the evidence of record rather than just on the new evidence." *Evans,* 9 Vet.App. at 283.

If the evidence satisfies the three Evans questions and is thus found to be new and material, then the second step of the *Manio* two-step process applies. The Board must then reopen the claim and "review the former disposition of the claim", 38 U.S.C. § 5108 – that is, review all the evidence of record to determine the outcome of the claim on the merits. *See Manio, supra; Jones (McArthur) v. Derwinski,* 1 Vet.App. 210, 215 (1991). A Board determination as to whether evidence is "new and material" for purposes of reopening is a question of law subject to de novo review by this Court under 38 U.S.C. § 7261(a)(1). *See Masors v. Derwinski,* 2 Vet.App. 181, 185 (1992); *Jones,* 1 Vet.App. at 213; *Colvin, supra.*

III. Factual Basis for Application of Presumption

A. General. The caselaw is clear that the presumption applies only if there is evidence of a worsening of the condition during service. The "question whether there has been an increase in disability during service must be answered in the affirmative before the presumption of aggravation attaches". *Verdon v. Brown*, 8 Vet.App. 529, 538 (1996) (citing *Hunt v. Derwinski*, 1 Vet.App. 292 (1991)). Stated another way, as did the Court in *Falzone*, the "presumption of aggravation is applicable only if the preservice disability underwent an increase in severity." *Falzone v. Brown*, 8 Vet.App. 398, 402 (1995).[2] It thus

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[2] The statutory provision in 38 U.S.C. § 1153 and the regulation promulgated pursuant to that provision, 38 C.F.R. § 3.306(a), both define aggravation in service for purposes of awarding compensation as "an increase in disability". The regulation in 38 C.F.R. § 3.306(b) defines the presumption of aggravation as arising where the "disability underwent an increase in severity". The Court in *Hunt v. Derwinski* considered the three provisions stated above, noting and highlighting the language used in section 1153 and § 3.306(a) and that used in § 3.306(b), and held: "From an examination of the statute and in view of the overall statutory and regulatory scheme, it is clear that aggravation in service is based upon a worsening of the pre-service condition to the extent that a veteran's average earnings capacity has been diminished." *Hunt*, 1 Vet.App. 292, 296 (1991). The Court further held that "temporary or intermittent flare-ups during service of a preexisting injury or disease are not sufficient to be considered 'aggravation in service' unless the underlying condition, as contrasted to symptoms, is worsened." *Id.* at 297. Accordingly, in *Hunt*, after examining the relevant statute and regulations, the Court interpreted the term "aggravation" as used in all three provisions to mean a lasting worsening of the condition – that is, a worsening that existed at the time of separation, *see Hensley*

would seem that under *Akins* and *Jensen* a presumption provides an evidentiary basis for reopening only if there is evidence of record that meets the criteria for invoking the presumption (that is, evidence that causes the presumption to attach).

I do not believe that this Court has ever expressly reopened a claim based on the mere failure of the BVA or RO in a previous final decision to consider the presumption of aggravation (or sound condition) or based on a new presumption that was not available at the time of the last final decision on the claim. The cases discussing the presumption of aggravation either did not discuss new and material evidence (*see, e.g., Stadin v. Brown*, 8 Vet.App. 280, 284 (1995); Townsend, *supra*) or were original service-connection cases (*see, e.g., Browder v. Brown*, 5 Vet.App. 268 (1993); *Hensley v. Brown*, 5 Vet.App. 155 (1993)) or were reopening cases that reopened on a basis separate from the consideration of the presumption (*see, e.g., Falzone, supra*).

The question, therefore, posed by the facts of this case is as follows: When a new presumption[3] is created

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v. Brown, 5 Vet.App. 155, 163 (1993) (holding, as to whether increase must be to next higher rating, that "the presence of a ratable increase in disability at separation would be conclusive of an in-service increase in disability, but the obverse would not be true; that is, the absence of a ratable in-service increase [at separation] would not rule out a determination of an increase in disability"). Subsequent Court opinions have used the terms in the provisions interchangeably in defining aggravation. *See, e.g., Verdon v. Brown*, 8 Vet.App. 529, 538 (1996); *Falzone v. Brown*, 8 Vet.App. 398, 402 (1995).

[3] It would appear, as a general matter, that a claim to reopen based on the "factual predicate", *Akins*, 1 Vet.App. at

subsequent to a prior final disallowance and certain fact-finding is required before that presumption applies, and the prior final disallowance included what was apparently a determination based on the old evidence that the factual basis for a finding of "worsening" was not present, must the appellant have *newly presented* evidence to show that factual basis in order to reopen? The majority opinion implicitly says "yes" but fails to provide its reasoning. *Ante* at 187. For the following reasons, I do not believe that such a conclusion can be reached consistent with the Court's existing precedential opinions.

B. Precedential Opinion Considering Old Evidence. In one case, *Townsend, supra,* the Court does appear, quite clearly, to have concluded that the evidentiary basis to trigger the presumption can be supplied by the old evidence. *Townsend* involved a claim to reopen by a war veteran and a previous 1983 RO final disallowance of his claim for service connection based on aggravation of preexisting pes planus; the RO "while acknowledging that appellant's induction examination did not document his foot condition and that severe pes planus was evident

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230, supplied by a new presumption (that is, one that became available after the prior final disallowance) would be on firmer footing than a claim to reopen based on the "factual predicate" supplied by a presumption in existence, but apparently ignored, at the time of the prior final disallowance of the claim (as was the case in both *Akins, supra,* and *Jensen v. Brown,* 19 F.3d 1413, 1415 (Fed.Cir.1994)), because with a new presumption it is *clear* that that presumption had not been previously considered. Here, however, we have the complicating factor that the final prior RO decision appears to have made a negative determination as to the factual basis needed to invoke the new presumption.

at the time of his discharge, denied his claim for service-connected pes planus" on the basis of "generally accepted medical principles". *Townsend*, 1 Vet.App. at 410. Neither the RO in 1983 or 1989, nor the BVA in its 1990 adverse decision there on appeal, mentioned the presumption of aggravation extant at the time of those decisions. The Board had found no aggravation during service, concluding that "the additional evidence received subsequent to [the 1983 RO decision] does not present a new factual basis". *Ibid.* The Court nevertheless reviewed *all the evidence of record* in order to find that the "appellant's foot disorder [had] increased in severity during service". *Ibid.* In remanding the matter, the Court there noted, inter alia, that the Board decision on appeal had not discussed the presumption of aggravation or the way it was rebutted and that the Board had had an obligation to apply relevant law. *Ibid.* The Court in *Townsend* neither discussed whether the appellant had presented new and material evidence nor did it specifically hold or state that the mere failure of the RO in 1983 to consider the presumption in the face of evidence raising the presumption's applicability constituted a basis for reopening. However, it certainly so concluded by implication. *Ibid.* Moreover, it appears clear that all the evidence in the record on appeal cited by the Court as the basis for its conclusion that the foot disorder had increased in severity during service was in-service evidence that had been before the RO in 1983 and had been rejected by the RO at that time. *See ibid.*

IV. Application of Law to Facts

I conclude that the Board would be required to consider the "new" presumption (in 1992 made available to peacetime veterans) in this case only if there is evidence that there was a worsening of the veteran's condition during service. If the Board can review all the evidence of record (including the service medical records), as in *Townsend*, in making such a determination, the evidence in this case appears to support a finding that the veteran's condition worsened (that is, that his disability underwent a lasting increase in severity that existed at the time of separation[4]), the 1992 presumption of aggravation would be triggered and would provide the basis for reopening the claim (under *Akins* and *Jensen*) and a remand would be required because the presumption clearly was not considered by the 1995 Board decision on appeal (*see Dolan v. Brown*, 9 Vet.App. 358 (1996)). Under this scenario, pursuant to applicable law and regulation, only after it is determined that the presumption should be applied does the burden shift to VA to rebut it by clear and unmistakable evidence by pointing to a specific finding that the increase in disability was due to the natural progression of the disease. *See Akins*, 1 Vet.App. at 232.

In the present case, however, there has already been a finding of no aggravation by a VARO in 1979, and this finding, under the reopening law, requires the veteran now to present new and material evidence on aggravation – the issue that formed the basis for that prior disallowance of the veteran's claim. *Evans*, 9 Vet.App. at

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[4] *See supra* note 2.

283. The RO in 1979 was not in error in failing to consider the presumption because the presumption of aggravation (§ 3.306) was not available to peacetime veterans at that time. Because the standard for determining aggravation did not change between 1979 and the present (that is, the statutory provision defining aggravation as "an increase in disability during . . . service" was the same in 1979 when it was codified at 38 U.S.C. § 353 (1979) as currently provided in 38 U.S.C. § 1153)[5], the new evidentiary presumption could not, by itself, serve as a basis for reopening the claim under the Court's current law on reopening. *See Evans, supra.* In determining whether "probative" new evidence has been submitted under *Evans,* the Board is limited to evidence submitted since the last final disallowance – the 1979 RO decision. Here the new presumption of aggravation would be both new and probative evidence under *Akins* and *Jensen* if there is an evidentiary basis that would trigger the presumption. The Court has not previously addressed directly whether that evidentiary basis in a reopening case must be provided only by the newly presented evidence or may be found in the "old" evidence.

Hence, I believe that *Townsend,* which is the only Court authority that appears to address the question in the instant case, supports the parties' collective position that this claim should be remanded for the Board to apply the presumption of aggravation to the facts of this case.[6] Were I writing on a blank slate as to this question, I might conclude that the majority's result is compatible with the

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[5] *See also supra* note 2.

[6] *See supra* note 3.

Court's current caselaw on the requirements that obtain when the Court is faced with a claim to reopen and the extent to which previously rejected evidence already of record may be considered in deciding whether new and material evidence has been presented.[7] However, in light of both parties' here having proposed a remand and there being strong support for their position in *Townsend, Akins,* and *Jensen,* all *supra,* I believe that any decision to reject that position should come only after the Court receives further briefing by the parties (and perhaps by amici curiae) on this particular question, and thereafter should probably be made by the en banc Court.[8] *See Bethea v. Derwinski,* 2 Vet.App. 252, 254 (1992) (only en banc Court can overturn panel decision).

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[7] *See Evans v. Brown,* 9 Vet.App. 273, 286, 288 (1996) (determining that had evidence previously found not to warrant reopening been considered as "newly presented" evidence for purposes of current claims to reopen, there would have been new and material evidence to reopen); *cf. Blackburn v. Brown,* 8 Vet.App. 97, 103 (1995) (citing *Reonal v. Brown,* 5 Vet.App. 458 (1993) (holding that medical opinion was not material where it was based on veteran's recitation of events that had already been rejected in previous final decision on merits) and concluding that evidence, predicated on previously rejected account of events, was not material).

[8] I would prefer to reserve judgment on this latter question until after supplemental briefing is received as to the applicability of these cases (*Jensen, supra; Townsend v. Derwinski,* 1 Vet.App. 408 (1991); and *Akins, supra*), and how they can be squared with *Evans, Blackburn,* and *Reonal,* all *supra.*

V. Conclusion

For the foregoing reasons, I believe that the majority has both rushed to judgment in this matter and reached a conclusion on the basis of inadequate consideration and articulation of the relevant caselaw and legal principles implicated by the facts of this case. Hence, I respectfully dissent as to the Court's affirmance at this point.

[LOGO]

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF BRIAN ROUTEN — SS 519 70 6426

DOCKET NO. 93-13 387) DATE
) APR 04, 1995
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On appeal from the decision of the
Department of Veterans Affairs Regional Office
in Portland, Oregon

THE ISSUE

Whether new and material evidence has been presented to reopen a claim of entitlement to service connection for psoriasis.

REPRESENTATION

Appellant represented by: The American Legion

ATTORNEY FOR THE BOARD

John Z. Jones, Associate Counsel

INTRODUCTION

The veteran-appellant had active service from December 1977 to October 1978.

This appeal arises from a December 1992 rating decision of the Portland, Oregon, Department of Veterans Affairs (VA) Regional Office (RO).

CONTENTIONS OF APPELLANT ON APPEAL

The veteran and his representative contend, essentially, that psoriasis was first diagnosed in service or in the alternative, that psoriasis was aggravated in service. He states that he received treatment for psoriasis within one year after discharge from service and that VA Medical Center records indicating treatment after service, from June 1979 to January 1992, constitute new and material evidence to reopen the claim of service connection for psoriasis. He further states that the presumption of soundness or in the alternative, the presumption of aggravation as sell as the benefit-of-the-doubt standard should be considered.

DECISION OF THE BOARD

In accordance with the provisions of 38 U.S.C.A. § 7104 (West 1991), after review and consideration of all the evidence and material of record in the veteran's claims file and for the following reasons and bases, the Board decides that new and material evidence has not been submitted to reopen the claim of service connection for psoriasis.

FINDINGS OF FACT

1. In a January 1979 rating decision, the RO denied the veteran's claim of entitlement to service connection for

psoriasis on the grounds that the evidence (service medical records) indicated a history of treatment for psoriasis prior to entrance into service and such condition was noted on entrance examination; after notification of the decision and his procedural and appellate rights was sent to the veteran in February 1979, he did not file an appeal.

2. The evidence presented or secured since the January 1979 rating decision by the RO consists of: records from several VA facilities, covering the period June 1979 to January 1992, which while new are not material because they do not create a reasonable possibility of changing the result of the previous adjudication as they do not show that there was an increase in the severity of psoriasis, as opposed to the worsening of symptoms, during service.

CONCLUSIONS OF LAW

1. The January 1979 rating decision by the RO, denying entitlement to service connection for psoriasis, was not appealed and the application became a finally adjudicated claim. 38 U.S.C.A. § 7105(c) (West 1991); 38 C.F.R. §§ 3.104(a), 3.160(d) (1994).

2. Evidence received since the January 1979 unappealed rating decision is not new and material to reopen the claim of service connection for psoriasis. 38 U.S.C.A. §§ 5108, 7104(b) (West 1991).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Factual Background

The evidence of record at the time of the January 1979 rating decision is summarized as follows:

On examination for acceptance into service in April 1977, the veteran indicated a history of skin disease that was treated by Dr. Cross. The examiner found a rash on the anterior surface of the legs and listed "psoriasis" as a disqualifying defect.

In July 1977, the veteran was re-examined on the basis of a letter form G.O. Cross, M.D. In his letter, Dr. Cross indicated: that he began treating the veteran in February 1977 for an eczematous patch on the right shin; that a patch on the left shin looked like psoriasis; that after treatment with medication the area was still a little scaly in April and May 1977; that by July 1977, the area had cleared; and that he concluded the condition was an exzematous patch. On the basis of these statements, the examiner changed psoriasis to "eczema, only episode, now clear" and found the veteran qualified for entrance into service.

Service medical records disclose that in January 1978, the veteran complained of itchy, scaly skin. In April and May 1978, he complained of a rash on his hands, elbows and knees and was referred to the dermatology clinic. On dermatological examination in May 1978, the diagnosis was psoriasis. Between May and September 1978, the veteran was treated for psoriasis. On examination in September 1978, the Medical Board cleared him for separation from service concluding that psoriasis vulgaris

rendered him physically unfit for service. The Medical Board also concluded that psoriasis existed prior to service and was not aggravated in service.

In a January 1979 rating decision, the RO, having considered the service medical records, denied service connection for psoriasis, on the grounds that psoriasis was not incurred in or aggravated by service. In February 1979, the VA notified the veteran of the denial of service connection for psoriasis and informed him of his right to appeal at any time within one year from the date of the notice. He did not file an appeal.

Records from several VA facilities, covering the period June 1979 to January 1992, disclose the following: In June 1979, the veteran reported being discharged from service for psoriasis and examination revealed some evidence of old psoriasis on elbows and knees; in April 1983, medical history included psoriasis; in February 1988, he sought treatment for psoriasis with a "long history"; in July 1991, he was hospitalized for an exacerbation of psoriasis with a "long history of psoriasis that was first diagnosed in 1977", and from September 1991 to January 1992, he was treated for psoriasis and history included psoriasis since 1979, psoriasis for 13 years and psoriasis that began to bother him in 1977.

In September 1992, the veteran sought to reopen the claim of service connection for psoriasis.

Analysis

Pursuant to 38 U.S.C.A. § 7105(c) (West 1991), when a claim is denied by a decision of the RO and the claimant

fails to file a timely appeal, that decision becomes final and the claim may not thereafter be reopened, except as may otherwise be provided by regulation not inconsistent with Title 38, United States Code. In *Suttman v. Brown*, 5 Vet.App. 127, 135-36 (1993), the United States Court of Veterans Appeals (Court) concluded that the finality rule in Section 7105(c) is subject to the exception in 38 U.S.C.A. § 5108 (West 1991), that requires the VA to reopen and readjudicate a claim when "new and material evidence" is presented or secured with respect to the claim.

To reopen a previously and finally disallowed claim, the Board must conduct a two-step analysis. *Manio v. Derwinski*, 1 Vet.App. 140, 145 (1991). First, the Board must determine whether the evidence presented or secured since the prior disallowance of the claim is "new and material". Second, if the evidence is new and material, then the case is reopened and the Board must evaluate the claim in light of all the evidence, both new and old.

"New" evidence is that which is not merely cumulative of other evidence of record. "Material" evidence is that which is relevant to and probative of the issue at hand and which must be of sufficient weight or significance that there is a reasonable possibility that the new evidence, when viewed in context of all the evidence, both new and old, would change the outcome. *Cox v. Brown*, 5 Vet.App. 95, 90 (1993). *See also*, 38 C.F.R. § 3.156 (1994). In determining whether the evidence is new and material, the credibility of the evidence is presumed. *Justus v. Principi*, 3 Vet.App. 510, 512-513 (1992).

In denying the veteran's claim for service connection in January 1979, the RO held that psoriasis pre-existed service and it was not shown to have been aggravated during service. In seeking to reopen the claim, the veteran would have to produce new and material evidence bearing on the question whether psoriasis was aggravated in service. An injury will be considered aggravated in service when there is an "increase in disability" 38 C.F.R. 3.306 (1994), which requires a worsening of the underlying *condition* and not merely a temporary worsening of *symptoms*, which lend themselves to flare-ups. *Hunt v. Derwinski*, 1 Vet. App. 292, 296 (1991). Alternatively, the veteran would have to produce evidence that psoriasis had onset in service to support his claim that psoriasis was first diagnosed in service.

The evidence added to the record since the January 1979 rating decision consists of VA medical records from June 1979 to January 1992. Inasmuch as the evidence shows current disability, identified as psoriasis, it is cumulative of evidence already of record when the claim was denied in 1979 and therefore the evidence is not new.

The additional evidence also contains the following pertinent history: discharged from service for psoriasis, psoriasis since 1979 or 13 years, a long history of psoriasis that was first diagnosed in 1977, and psoriasis that began to bother him in 1977. Of the histories, the fact that the veteran was discharged form service for psoriasis is not new evidence. The history of psoriasis since 1979 or 13 years is not material because it does not pertain to aggravation of a pre-existing skin condition or to the onset of psoriasis in service. As for the long history of psoriasis that was first diagnosed in 1977 and that

psoriasis began to bother him in 1977, implying the onset of psoriasis in service, these histories necessarily relied on information from the veteran as the service medical records clearly document a pre-existing skin condition and there is no other objective, independent basis upon such a history could be based. History based upon an inaccurate factual premise has no probative value, therefore, it is not material because it does not present a reasonable possibility that the new evidence when viewed in the context of all the evidence, both new and old, would change the outcome.

For these reasons, the additional evidence is not new and material and the claim is not reopened. As the claim is not reopened, the Board does not reach the merits of the claim including the application of the presumption of aggravation, the presumption of soundness, the one-year presumption for specified chronic diseases as well as the benefit-of-the-doubt standard. 38 C.F.R. §§ 3.102, 3.304, 3.306, 3.307.

ORDER

The application to reopen the claim of service connection for psoriasis is denied.

/s/ Renée M. Pelletier
RENÉE M. PELLETIER
Member, Board of Veterans' Appeals

The Board of Veterans' Appeals Administrative Procedures Improvement Act, Pub. L. No. 103-271, § 6, 108

Stat. 740, ___ (1994), permits a proceeding instituted before the Board to be assigned to an individual member of the Board for a determination. This proceeding has been assigned to an individual member of the Board.

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C.A. § 7266 (West 1991), a decision of the Board of Veterans' Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans Appeals within 120 days from the date of mailing of notice of the decision, provided that a Notice of Disagreement concerning an issue which was before the Board was filed with the agency of original jurisdiction on or after November 18, 1988. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402 (1988). The date which appears on the fact of this decision constitutes the date of mailing and the copy of this decision which you have received is your notice of the action taken on your appeal by the Board of Veterans' Appeals.